IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICITON

WRIT PETITION NO.1517 OF 2007

M/s.Safari Mercantile Pvt.Ltd.
C/o.M/s. G.P. Mehta & Co. C.As.
807, Tulsiani Chambers,
Nariman Point, Mumbai - 400 021 .. Petitioner.

Versus

1. Income-tax Appellate Tribunal
Mumbai Bench "A" Mumbai,
having its office of Govt. of
India, Old C.G.O. Building,
4th Floor, Maharshi Karve
Road, Mumbai - 400 020.

2. Asstt. Commissioner of Income-
tax, Circle 2(3), Mumbai,
having his Office at Aayakar
Bhavan, M. Karve Road,
Mumbai - 400 020.

3. The Union of India,
through Ministry of Law,
Aayakar Bhavan, M.K. Road,
Mumbai - 400 020. .. Respondents.

Mr.S.J. Mehta for the petitioner.

Mr.Ashok Kotangale for the respondent.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

DATED : 31ST JULY, 2007.

ORAL JUDGMENT (Per J.P. Devadhar, J.)

1. Heard. Rule. Rule made returnable forthwith. By consent of the parties, the Writ Petition is taken up for final hearing.

2. This petition is filed to challenge the

order passed by the Income tax Appellate Tribunal, Bombay dated 7th March, 2007 whereby the Miscellaneous Application filed by the petitioners seeking rectification of mistake in the order passed by the Tribunal on 9th May, 2006 has been dismissed.

3. The assessment year involved herein is A.Y.2001-2002.

4. Return of income for assessment year 2002-2003 was filed on 31st October, 2001 and the assessee paid self assessment tax of Rs.90,00,000/-.

5. On 30th December, 2001, an order was passed by the respondent No.2 under Section 140-A of the Act stating therein that the assessee has not paid full amount of self assessment tax and accordingly the assessee was treated as assessee deemed to be in default in respect of tax, surcharge and interest remaining unpaid. After issuing notice under Section 221 of the Act, penalty was levied by passing an order on 7th February, 2002.

6. On appeal filed by the assessee, the CIT (A) inter alia accepted the contention of the assessee that the Assessing Officer did not raise any demand against the assessee and simply issued the penalty notice and, accordingly held that the assessee

cannot be said to be in default.

7. On appeal filed by the revenue, the I.T.A.T. by its order dated 9th May, 2006, held that the demand of tax in this case was undisputed and, accordingly sustained the penalty to the extent of tax remaining unpaid.

8. The assessee filed a Miscellaneous Application before the I.T.A.T. seeking rectification of the order dated 9th May, 2006. By the impugned order dated 7th march, 2007 the Tribunal dismissed the said Miscellaneous Application. Hence, this petition.

9. The grievance of the petitioner is that when the CIT (A) has deleted the penalty by recording a finding that the Assessing Officer did not raise any demand against the assessee, the Tribunal could not have held that no plea was raised by the assessee regarding non service of the demand notice. Mr.Kotangale, learned Counsel for the revenue submitted that there are documents to show that the demand notice was in fact served upon the assessee.

10. The only question to be considered in this petition is whether the Tribunal is justified in

rejecting the Miscellaneous Application filed by the assessee on the ground that at the hearing of the appeal the assessee had not raised the plea that demand notice has not been served upon the assessee.

11. On perusal of the order passed by CIT (A), it is seen that the penalty levied under Section 221 of the Act was deleted on the ground that the demand notice has not been served upon the assessee. In the appeal filed by the revenue against the said order of CIT (A), the main issue was whether the CIT (A) was justified in holding that there was no service of demand notice. Therefore, the finding recorded by the Tribunal that the plea regarding non service of the demand notice was not raised before the Tribunal cannot be sustained.

12. Accordingly, the Writ Petition is allowed. The impugned order dated 7th March, 2007 passed by the Tribunal is set aside and the Tribunal is directed to dispose of the Miscellaneous Application on merits.

13. The contention of both sides are kept open.

14. The Writ Petition is allowed in the aforesaid terms with no order as to costs.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)